IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 515

In the Matter

of

LYTTLETON B. P. GOULD,

Bankrupt.

JOSEPH K. SHERMAN, Trustee, Estate of Lyttleton B. P. Gould, Bankrupt,

Petitioner,

against

WILLIAM E. BUCKLEY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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In the Matter of LYTTLETON B. P. GOULD, Bankrupt. JOSEPH K. SHERMAN, Trustee, Estate of Lyttleton B. P. Gould, Bankrupt, Petitioner, against WILLIAM E. BUCKLEY, *et al.*, Respondents.	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, JOSEPH K. SHERMAN, as Trustee in Bankruptcy of the Estate of Lyttleton B. P. Gould, Bankrupt, respectfully prays this Court for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a final judgment of that Court entered on the 23rd day of May, 1941, reversing a decree and order of the District Court of the United States for the Southern District of New York, entered on the 20th day of December, 1940, enjoining respondents from taking any steps in an action in the State Courts of New York to enforce an attorney's lien for services and disbursements.

Statement of the Matter Involved.

Petitioner is, and since the 26th day of January, 1934, has been the duly acting and qualified Trustee of the Estate of Lyttleton B. P. Gould, Bankrupt, in proceedings pending in the District Court of the United States for the District of Connecticut (R. fol. 56).

In 1927, Gould, not then bankrupt, sued one William S. Murray and one Henry Flood, Jr., co-partners, in the Supreme Court of New York in an action for damages due to the claimed interference by the defendants with a promotion contract, and for commissions due from the defendants in the promotion, beginning in 1923, of hydro-electric projects, known as the Santee-Cooper Development and the Saluda River Development in South Carolina (fols. 20, 21, 26, 27).

In connection with said action, said Gould retained the respondents, Buckley & Buckley, as his attorneys under an agreement that they should serve for a contingent fee of 50% of any net recovery (fols. 70, 71).

The case came to trial on November 7, 1932 (fol. 36), and at the conclusion of the plaintiff's case, the Court directed a nonsuit (fol. 80). Gould appealed; and the appeal was pending at the time of Gould's adjudication in bankruptcy on January 11, 1934, in the District Court of the United States for the District of Connecticut (fols. 125, 126).

Petitioner Sherman, Trustee of Gould, with the consent of the Referee in Bankruptcy in charge of said matter, permitted the bankrupt to continue to prosecute the action in his own name with the understanding that the avails thereof would inure to the benefit of the bankrupt's estate (fol. 27).

On January 9, 1935, the record on appeal not yet having been perfected or filed (fol. 126), Gould, with the con-

sent of petitioner (fols. 44 to 47), having decided to engage new attorneys, moved in the Supreme Court of New York for the substitution of Davies, Auerbach & Cornell, which firm subsequently became Davies, Auerbach, Cornell & Hardy, as his attorneys in said action (fols. 69 to 75).

Subsequently, on January 16, 1935, the respondents herein filed a petition for determination of the amount of their attorneys' lien (fols. 94 to 105).

In connection with the petition of respondents for determination of said lien, respondents advised said Supreme Court of New York that Gould had theretofore been adjudicated bankrupt and that a trustee had been appointed of his estate (fols. 100, 101).

No notice was ever given to the trustee of such application for determination of attorneys' lien, and he was given no opportunity to be heard on such matter (fols. 53, 81), although notice of same was given to Davies, Auerbach, Cornell & Hardy, the attorneys for Gould in said action.

Thereafter, on February 25, 1935, Mr. Justice McGoldrick made and entered an order in said Supreme Court of New York substituting Davies, Auerbach & Cornell as attorneys for the plaintiff in said action, and further awarding to the respondents a lien of 30% upon any monies recovered in said action, together with a lien for disbursements necessarily made, which disbursements should be determined by a referee (fols. 58 to 63).

After substitution, Davies, Auerbach, Cornell & Hardy perfected the appeal, and the Appellate Division reversed the judgment and order a new trial (fol. 30).

The second trial of the action was begun on October 8, 1940 (fol. 82), Davies, Auerbach, Cornell & Hardy appearing for the plaintiff, and on October 14, 1940, the case was settled by a judgment being entered, on stipula-

lation, for breach of contract, in the sum of $40,000.00, without interest and without costs (fol. 204).

Execution was stayed upon the following terms: $10,000 to be paid within ten days after the entry of said judgment, and $5,000 every three months thereafter until the full amount was paid (fols. 204 and 205).

Thereupon, the respondents moved in the Supreme Court of New York for an order directing said Murray & Flood to pay to them 30% of the amount agreed upon, together with their expenses, as a condition of receiving satisfaction of the judgment which was to be entered (fols. 160 and 161).

Petitioner, in ancillary proceedings, applied to the United States District Court for the Southern District of New York for an order enjoining respondents from proceeding with said motion on the ground that the Supreme Court of New York had no jurisdiction over the recovery, because the right of action was an asset in bankruptcy and subject to the paramount and exclusive jurisdiction of the bankruptcy court, and that therefore the order determining the attorneys' lien was void (fols. 19 to 33).

On October 23, 1940, a temporary injunction and an order to show cause why a permanent injunction should not be issued was made by Hon. Vincent L. Leibell, District Judge (fols. 15 to 18), and, after hearing, an opinion was handed down by Hon. John W. Clancy, District Judge, granting said motion for an injunction (fols. 211 to 213).

On December 20, 1940, in accordance with said opinion, an order was duly entered by the United States District Court for the Southern District of New York enjoining and restraining respondents from proceeding or taking any further proceedings to collect upon or to assert their attorneys' lien, except in the bankruptcy proceedings of Lyttleton B. P. Gould (fols. 10 to 14).

On appeal, the Circuit Court reversed the order of the District Court and denied the motion for an injunction (fol. 220, *et seq.*), the opinion of the Circuit Court being reported in 119 F. 2d. 280.

Basis of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, by Act of January 31, 1928, c. 14, sec. 1, 45 Stat. 54, and by Act of June 7, 1934, c. 426, 48 Stat. 926 (28 U. S. C. A. Section 347).

The judgment of the Circuit Court of Appeals for the Second Circuit sought to be reviewed was entered on May 23, 1941.

Questions Presented.

I.

Whether a State court or any court other than the bankruptcy court may determine the amount, or validity, of an attorney's lien against a chose in action, upon substitution of new attorneys in the suit upon such chose in action, where such chose in action was for money damages for breach of contract and tortious interference with a contract and therefore the action was one *in personam*, when during the pendency of such action and prior to such substitution and determination of the attorney's lien, the plaintiff was adjudicated a bankrupt and such suit was continued in the name of the bankrupt, although the judge of the State court was advised of the adjudication in bankruptcy and the appointment of a trustee of bankrupt's estate?

II.

Whether a State court or any court other than the bankruptcy court acquires jurisdiction over the proceeds of an action *in personam,* or acquires any jurisdiction other than the right to determine the issues in such action (*i. e.*, whether or not plaintiff is entitled to damages from the defendants, and if he is, the amount of such damages), so that where the plaintiff was adjudicated a bankrupt prior to a settlement of or judgment in such action, it had the power and authority to determine the amount or validity of claims or liens against the proceeds of a subsequent settlement or judgment despite the exclusive jurisdiction of the bankruptcy court over the property of the bankrupt?

III.

Whether a trustee in bankruptcy, in allowing to be continued a pending action *in personam* in a State court in the name of the bankrupt, with the consent of the bankruptcy court, thereby submitted himself to the jurisdiction of the State court so that such court had the power to determine the amount or validity of an attorney's lien upon any possible proceeds of such action?

IV.

Whether the mere permission of a bankruptcy court to allow an action *in personam* to be prosecuted in a State court is a consent by the bankruptcy court that such State court may determine the validity or amount of liens or claims against the proceeds of such action *in personam?*

V.

The bankruptcy court's exclusive jurisdiction over the property of a bankrupt having attached, may control of the administration of the estate be surrendered even by that court itself?

VI.

Whether a State statute, giving authority to the courts of such State to determine attorneys' or other liens in actions *in personam* pending before such courts, must give way to the paramount and exclusive jurisdiction given to the bankruptcy courts by Congress under authority of the Constitution?

VII.

Whether a litigant has the absolute right to discharge his attorney and be represented by counsel of his own selection, or whether, as held by the Circuit Court below, "he could not insist that new attorneys should represent him in that court without its consent"?

Statute Involved.

Section 475 of the Judiciary Law of New York, which provides as follows:

> "From the commencement of an action, special or other proceeding in any court or before any state or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment, or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien."

Reasons for Granting the Writ.

I.

The decision of the Circuit Court of Appeals for the Second Circuit in the instant case that the pendency of the action, which was one *in personam*, gave the State court authority to determine the amount of the lien of the displaced attorneys to any proceeds of such action, despite the adjudication as bankrupt of the plaintiff prior to the commencement of proceedings for determination of such lien, is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *McDaniel National Bank* v. *Bridwell*, 65 F. 2d 428, wherein it was held that where a trustee in bankruptcy brought a plenary suit in equity in the district court against a person and a bank to recover money on deposit in the bank which he claimed was created by money of the bankrupt and was transferred to defraud creditors, and the equity court determined the issues in favor of the trustee, such equity court had no jurisdiction to determine any claim of the bank against the proceeds of such judgment even though they had been paid into the registry of the equity court, since the suit by the trustee was one *in personam*, that the equity court had obtained no jurisdiction over the deposit further than the jurisdiction to determine the question of ownership, and that such ownership having been determined, the bank must resort to the bankruptcy court for a determination of its claim, as under the law all of the assets of bankrupt were subject to the jurisdiction of the bankruptcy court, which jurisdiction was exclusive and could not be surrendered.

II.

The Circuit Court of Appeals for the Second Circuit in the instant case has decided an important question of

local law in a way probably in conflict with applicable local decisions in that said court decided that new attorneys could not be substituted in the State court action without the consent of that court, as against the universal decisions of the New York State courts that a client who employs an attorney has an absolute right to discharge the attorney and substitute new attorneys of his own selection. See *Crowley* v. *Wolf*, 281 N. Y. 59, 22 N. E. 2d 234; *Greenberg* v. *Remick & Co.*, 230 N. Y. 70, 129 N. E. 211; *Matter of Krooks*, 257 N. Y. 329, 178 N. E. 548; *Matter of Dunn*, 205 N. Y. 398; *Matter of Tillman*, 259 N. Y. 133, 181 N. E. 75; *Martin* v. *Camp*, 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917 F. 402; *Matter of City of New York*, 219 N. Y. 192; *Burnham* v. *Brush*, 26 N. Y. Supp. 2d 397; *Degen* v. *Steinbrink*, 188 App. Div. 622, 625; *Lynn* v. *Agnew*, 179 App. Div. 305, 309; *Corcoran* v. *Kellogg Structural Co.*, 179 App. Div. 396; *Matter of Board of Water Supply (Bell)*, 179 App. Div. 877; *Jeny* v. *Merkle*, 128 App. Div. 833; *Roake* v. *Palmer*, 119 App. Div. 64; *Johnson* v. *Ravitch*, 113 App. Div. 810; *In re Cusinamo's Will*, 22 N. Y. S. 2d 677, 174 Misc. 1068.

III.

A. An important question of Federal law which has not been, but should be, settled by this Court is whether, where the bankruptcy court consents that the trustee prosecute an action *in personam* in the name of a bankrupt, such consent carries with it an implied consent that the court in which said action is pending may determine claims to or liens against the proceeds of such action. This is of the utmost importance as a guide to bankruptcy courts in the administration of estates so that the paramount and exclusive jurisdiction given to bankruptcy courts by Congress, under the Constitution, to administer estates in bankruptcy, including the power and jurisdic-

tion over all cases and controversies between the bankrupt and his creditors for the collection of assets and the ascertainment and liquidation of liens thereon, and for the marshaling and disposition of funds so as to secure the rights of all parties and to effect a due distribution among all creditors, shall not be inadvertently and unknowingly, or my implication, delegated to some other court.

B. The Circuit Court for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this court. Prior to this case, there has never been a decision on the exact question of whether a trustee, by bringing, intervening in or continuing in the name of the bankrupt a plenary suit *in personam* for money damages thereby submits himself to the jurisdiction of the court in which such suit is pending to the extent that such court may determine liens or claims, such as attorney's liens, against the proceeds of such suit. The questions involved herein are of the utmost importance in administering the bankruptcy law in the several States having statutory attorney's liens such as in New York, so that both the Federal courts and the State courts may be guided, in similar cases, in determining whether the validity and amounts of such liens must be adjudicated by the bankruptcy courts by virtue of their paramount and exclusive jurisdiction over all assets of a bankrupt in his actual or constructive possession at the time of the filing of the petition in bankruptcy, thus insuring the orderly administration of bankrupt's estates and the determination of all liens and claims against property of bankrupt in such bankruptcy court, or whether the court in which such plenary action *in personam* is pending may determine such liens or claims to the proceeds of such action.

C. The Circuit Court for the Second Circuit has decided an important question of Federal law which has not been, but should be, settled by this court. Prior to this case, there has never been a decision by this court on the question as to whether a trustee, by allowing to be continued in the name of the bankrupt a plenary suit *in personam* for money damages, thereby submits himself to the jurisdiction of the court in which such suit is brought. The Circuit Court in the instant case held that he does thereby submit himself to the jurisdiction of such court, saying that in such circumstances "we deal with the case as though he had been openly the party plaintiff." This decision is contrary to dicta of the same Circuit Court in the case of *In Re Prudence Co.*, 96 F. 2d 157, where that court said, among other things, that a trustee may elect not to take over the prosecution but may allow the suit to be continued by the bankrupt and later claim the fruits of any recovery, and "by so doing they would be able to obtain the benefit of such judgment as the debtor might finally obtain without subjecting the estate to liability for past or future services of the attorney or for costs, in case the suit should fail." Circuit Court Judge Swan, in said case, cited as authority for such statement *Kessler v. Herklotz*, 132 App. Div. 278, 117 N. Y. S. 45, 22 Am. B. R. 257.

IV.

The Circuit Court, in the instant case, has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

A. The decision of the Circuit Court to the effect that the exclusive jurisdiction of the bankruptcy court was no bar to the power of the State court to determine the attorneys' lien in the suit *in personam* pending in said

court is in conflict with the decisions of this Court in *Gross* v. *Irving Trust Co.*, 289 U. S. 342, 77 L. Ed. 1243, 53 S. Ct. 342 and in *Taylor* v. *Sternberg*, 239 U. S. 470, 79 L. Ed. 599, 55 S. Ct. 260. In both of these cases, this Court held that the paramount and exclusive jurisdiction of the bankruptcy court precluded the State courts from fixing the compensation of their own receivers, the sole power to fix such compensation and fees having passed to the bankrutcy court. In other words, this Court determined that the statutory rights of the State courts to fix compensation and fees in receivership cases pending before them must give way to the paramount jurisdiction of the bankruptcy courts. Applying these decisions to the instant case, it appears that the statutory power of the State courts of New York to determine and enforce an attorney's lien upon the petition of the client or attorney, granted under Sec. 475 of the Judiciary Law of New York, must also give way to the paramount jurisdiction of the bankruptcy courts granted to them by Congress under the authority of the United States Constitution.

B. The decision of the Circuit Court to the effect that the prosecution of the suit *in personam* in the State court necessarily involved a consent to the exercise of that court's jurisdiction to liquidate the charging lien of the displaced attorneys is in conflict with the decision of this Court in *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 51 S. Ct. 270, 75 L. Ed. 645. In that case, this Court held that the paramount and exclusive jurisdiction of the bankruptcy court precluded any court other than a bankruptcy court from interfering with property subject to the exclusive jurisdiction of the bankruptcy court, save with the consent of the bankruptcy court; that the action of the trustee in removing the cause from the State court to the United States District Court was not a consent to the jurisdiction of said court, as the officers of a court of

bankruptcy have no power to oust the bankruptcy court of jurisdiction over property which has come into its possession.

V.

The Circuit Court, in the instant case, has decided a Federal question in a way probably in conflict with applicable decisions of this Court, and has decided an important question of general law in a way probably untenable or in conflict with the weight of authority.

The Circuit Court in the instant case decided that the statutory power of the State court, in New York, to determine attorneys' liens in actions pending before them, could not be abridged by the laws of Congress relating to bankruptcy, and that such State courts may determine attorneys' liens against choses in action which are property of bankrupt estates. This decision is in conflict with the decision of this Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, 84 L. Ed. 370, 60 S. Ct. 343, wherein this Court held that the States cannot, in the exercise of control over local laws and practice, vest their courts with power to violate the supreme law of the land; and that the Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, may exercise over the person and property of a bankrupt.

The Circuit Court in the instant case also decided, in effect, that the pendency of a suit *in personam* in a State court conferred jurisdiction on that court to determine liens against the proceeds of such suit, despite the fact that a court of superior jurisdiction had custody of the *res*, which was the chose in action, and that the prosecution of such a suit *in personam* was a consent to the determination by the State court of such lien against the proceeds. This is contrary to the overwhelming weight

of authority, which is to the effect that a suit *in personam* confers on a court no jurisdiction other than the jurisdiction to determine the issues presented by the pleadings, *i. e.*, whether or not plaintiff is entitled to money damages and the amount of such damages; that the bankruptcy court is a court of paramount or superior jurisdiction; that where a court of superior or paramount jurisdiction has custody of property, no other court may interfere with the jurisdiction of such court over the property, and that such court may protect its jurisdiction by injunction; that such jurisdiction may not be interfered with in any way, save with the actual consent of the court of superior jurisdiction; and that an officer of a court of paramount jurisdiction cannot affect the jurisdiction of such court, whether by waiver, estoppel or laches.

Prayer for Writ.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit be granted.

Dated, Stamford, Connecticut, August 8, 1941.

JOSEPH K. SHERMAN, *as Trustee of Estate of Lyttleton B. P. Gould, Bankrupt, Petitioner.*

By SYDNEY C. PERELL,
Counsel for Petitioner.